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SEP 24 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

In re the Marriage of:)	
)	
ROBERT A. MOORE,)	2 CA-CV 2012-0059
)	DEPARTMENT A
Petitioner/Appellant,)	
)	<u>MEMORANDUM DECISION</u>
and)	Not for Publication
)	Rule 28, Rules of Civil
BONNIE J. MOORE,)	Appellate Procedure
)	
Respondent/Appellee.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF SANTA CRUZ COUNTY

Cause No. DO09302

Honorable Anna M. Montoya-Paez, Judge

AFFIRMED

Karp & Weiss, P.C.
By Jennifer A. Manzi

Tucson
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By Michael Aaron

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E C K E R S T R O M, Presiding Judge.

¶1 Petitioner/appellant Robert Moore appeals from the decree entered in this marital dissolution action. He argues the trial court abused its discretion when it divided

the marital property unequally, ordered him to pay spousal maintenance to respondent/appellee Bonnie Moore, and awarded Bonnie the attorney fees she had incurred below. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding the judgment. *See Bell-Kilbourn v. Bell-Kilbourn*, 216 Ariz. 521, n.1, 169 P.3d 111, 112 n.1 (App. 2007). Robert and Bonnie were married in 1979, and Robert filed a petition for dissolution of the marriage in December 2009. After a two-day trial, the court ordered the marriage dissolved, divided the parties' property, and awarded Bonnie spousal maintenance and part of the attorney fees she had incurred. This timely appeal followed.¹

Discussion

¶3 Robert argues the trial court abused its discretion in dividing the assets and liabilities of the parties, in awarding Bonnie lifetime spousal maintenance, and in awarding Bonnie a portion of her attorney fees. We review the court's division of property in a dissolution proceeding for an abuse of discretion. *Hrudka v. Hrudka*, 186 Ariz. 84, 93, 919 P.2d 179, 188 (App. 1995). We likewise review for an abuse of discretion the court's spousal maintenance award, *Deatherage v. Deatherage*, 140 Ariz. 317, 319, 681 P.2d 469, 471 (App. 1984), and its award of attorney fees. *MacMillan v. Schwartz*, 226 Ariz. 584, ¶ 36, 250 P.3d 1213, 1221 (App. 2011).

¹Although Robert filed his first notice of appeal before the entry of the final judgment, which would render that notice a nullity, *see Craig v. Craig*, 227 Ariz. 105, ¶¶ 2, 13, 253 P.3d 624, 624, 626 (2011), he timely filed a second notice after entry of the final judgment. Thus, we have jurisdiction over this appeal pursuant to A.R.S. § 12-2101(A)(1).

¶4 Robert contends the trial court awarded Bonnie property worth over \$300,000 while awarding him property only worth \$36,000, “result[ing] in a windfall to [Bonnie] for which there is no justification.” He further contends the “unequal division of community and joint tenancy property is appropriate only in limited circumstances, which do not apply here.”

¶5 The trial court in a dissolution proceeding must “divide the community, joint tenancy and other property held in common equitably, though not necessarily in kind.” A.R.S. § 25-318(A). “[A]ll marital joint property should be divided substantially equally unless sound reason exists to divide the property otherwise.” *Toth v. Toth*, 190 Ariz. 218, 221, 946 P.2d 900, 903 (1997). “That approach simply reflects the principle that community property implies equal ownership.” *Id.* Thus, in most cases, dividing jointly held property equally will be the most equitable. *Id.*

¶6 However, the “touchstone of determining what is ‘equitable’ is a ‘concept of fairness dependent upon the facts of particular cases.’” *Inboden v. Inboden*, 223 Ariz. 542, ¶ 13, 225 P.3d 599, 602 (App. 2010), *quoting Toth*, 190 Ariz. at 221, 946 P.2d at 903; *accord Flower v. Flower*, 223 Ariz. 531, ¶ 31, 225 P.3d 588, 595-96 (App. 2010). Factors that bear on the equity of the division include: the length of the marriage, the contributions of each spouse to the community, the source of funds used to acquire the property, the distribution of debt, and any other fact affecting the outcome. *Inboden*, 223 Ariz. 542, ¶ 18, 225 P.3d at 604.

¶7 When making its ruling here, the trial court held that “[t]he division of property will be equitable in order that [Bonnie] be able to be self sufficient.” The court

also noted that she has health issues and now has no health insurance. The court ordered that Bonnie retain the marital residence—indisputably the parties’ most valuable asset—while Robert would keep a parcel of vacant land. It ordered a boat and an airplane sold and the proceeds divided, ordered each party to keep two automobiles, and allowed Bonnie to keep most of the home furnishings, the horses, and horse equipment. Robert contends the court’s division resulted in a substantially unequal distribution of property that amounts to a difference in value of over \$200,000 in favor of Bonnie.

¶8 Bonnie acknowledges the disparity in the value of property awarded but contends it is not as great as Robert claims. She argues his calculations are “based solely on [Robert]’s allocation or opinion of values and not [the] trial court’s findings of fact or any ruling by the trial court.” In general, when the evidence presented by each party as to the value of marital property is different, the court does not abuse its discretion in adopting one spouse’s valuations of the property over the other’s valuations. *See Lee v. Lee*, 133 Ariz. 118, 123, 649 P.2d 997, 1002 (App. 1982) (credibility determinations and resolution of conflicting evidence within discretion of trial court). Moreover, Robert’s argument about the disparity in values is predicated largely on the testimonial evidence presented at the trial, and he has failed to provide us with the trial transcript. *See Baker v. Baker*, 183 Ariz. 70, 73, 900 P.2d 764, 767 (App. 1995) (appellant required to “mak[e] certain the record on appeal contains all transcripts or other documents necessary for us to consider the issues raised”); *see also* Ariz. R. Civ. App. P. 11(b). Accordingly, we presume any missing transcript supports the court’s ruling. *See Baker*, 183 Ariz. at 73, 900 P.2d at 767; *accord Boltz & Odegard v. Hohn*, 148 Ariz. 361, 366, 714 P.2d 854,

859 (App. 1985) (“Where no transcript of evidence is made part of the record on appeal, a reviewing court will not question the sufficiency of evidence to sustain the ruling.”).

¶9 Robert contends the trial court erred in distributing the community property unequally, claiming “no pertinent case law” allows it. But he fails to cite any authority prohibiting it or to demonstrate why this particular unequal distribution would not be permitted by *Toth*, which provides for equitable distribution based on any “sound reason” including conduct not related to the property. 190 Ariz. at 221, 946 P.2d at 903; *accord Kelly v. Kelly*, 198 Ariz. 307, ¶ 8, 9 P.3d 1046, 1048 (2000). Robert has not shown the court did not have “sound reason[s]” to depart from an equal distribution.² *Id.* We find no abuse of discretion in the division of property.

¶10 Robert also argues the trial court abused its discretion in awarding Bonnie spousal maintenance. The court may grant a spousal maintenance order if it finds the spouse seeking maintenance either

1. Lacks sufficient property, including property apportioned to the spouse, to provide for that spouse’s reasonable needs.

²The trial court’s minute entry specifically identified Bonnie’s need for self-sufficiency as a basis to equitably divide the property here. We note that a party’s self-sufficiency is typically a factor courts consider when deciding whether to award spousal maintenance. *See* A.R.S. § 25-319(A). And, in general, “property division and spousal maintenance are two separate and distinct considerations at dissolution.” *Koelsch v. Koelsch*, 148 Ariz. 176, 182, 713 P.2d 1234, 1240 (1986). However, Robert has not squarely argued nor offered any legal authority for the proposition that self-sufficiency cannot be a “sound reason” for an unequal distribution under *Toth*. 190 Ariz. at 221, 946 P.2d at 903. For this reason, we do not address that question. *See Polanco v. Indus. Comm’n*, 214 Ariz. 489, n.2, 154 P.3d 391, 394 n.2 (App. 2007) (appellant’s failure to develop and support argument waives issue on appeal).

2. Is unable to be self-sufficient through appropriate employment

3. Contributed to the educational opportunities of the other spouse.

4. Had a marriage of long duration and is of an age that may preclude the possibility of gaining employment adequate to be self-sufficient.

A.R.S. § 25-319(A).

¶11 Once the trial court has found a spouse entitled to maintenance, the factors in § 25-319(B) apply to determine the amount to be paid. *See Martin v. Martin*, 156 Ariz. 452, 456, 752 P.2d 1038, 1042 (1988). Robert complains “the trial court made no specific findings to support its award of spousal maintenance.” But he apparently did not request findings of fact and conclusions of law, *see* Ariz. R. Fam. Law P. 82(A), and thus, we presume the court found every fact necessary to sustain its ruling. *See Neal v. Neal*, 116 Ariz. 590, 592, 570 P.2d 758, 760 (1977). Furthermore, without the transcript, we also must presume the trial testimony supports the court’s award. *See Baker*, 183 Ariz. at 73, 900 P.2d at 767.

¶12 Here, the trial court found that during the parties’ thirty-year marriage, Bonnie had taken care of the children and the home. She also had contributed to Robert’s education by providing transportation and caring for the home while he was in flight school. The court found Bonnie was fifty-one years old with no “expertise in an area that would make her self-sufficient” and has health issues and no health insurance. These findings—inability to be self-sufficient, educational contribution, long marriage, and age—directly correspond to the statutorily enumerated factors that support an award of

maintenance. *See* § 25-319(A)(2)–(4). Because the court based its award on the enumerated factors found in § 25-319(A), we find no abuse of discretion.

¶13 However, Robert contends “the amount of spousal maintenance determined by the trial court is also an abuse of discretion.” The court ordered Robert to pay Bonnie spousal maintenance of \$1,000 per month for one year and \$500 per month thereafter. He argues the court erred when it implicitly did not consider his financial needs and his ability to pay maintenance pursuant to § 25-319(B)(4). First, we presume the court considered all the financial information the parties submitted. *See Fuentes v. Fuentes*, 209 Ariz. 51, ¶ 18, 97 P.3d 876, 880 (App. 2004). Second, in the absence of the transcript, we must further presume the testimony, on which Robert primarily relies to support his arguments, supports the court’s ruling. *See Baker*, 183 Ariz. at 73, 900 P.2d at 767. We find no abuse of discretion in the amount and duration of maintenance awarded.

¶14 Finally, Robert contends the trial court abused its discretion in awarding Bonnie her attorney fees under A.R.S. § 25-324. Pursuant to that provision, a court, “after considering the financial resources of both parties and the reasonableness of the positions each party has taken throughout the proceedings, may order a party to pay a reasonable amount to the other party for the costs and expenses of maintaining or defending any proceeding under this chapter.” § 25-324(A). Here, the court found Bonnie was entitled to a portion of her fees “because of the inequities of [the parties’] earning capacit[ies].” Again, Robert has based his contentions primarily on the testimony adduced at trial, for which he has not provided this court a transcript. We therefore

presume the court's ruling is supported by the evidence, and we find no abuse of discretion.

Disposition

¶15 For the foregoing reasons, the decree of dissolution is affirmed. Bonnie has requested her attorney fees on appeal pursuant to § 25-324 based on Robert having “a greater earning capacity” and taking “unreasonable legal positions at every opportunity.” Although we are hesitant to classify Robert's arguments on appeal as unreasonable, his chance of prevailing on his fact-specific claims was small in light of our deference to the trial court on such matters and his failure to include the relevant transcripts in the record on appeal. The record also shows Robert does have a greater earning capacity than Bonnie, and we therefore award Bonnie a reasonable sum of attorney fees upon her compliance with Rule 21(c), Ariz. R. Civ. App. P. For the same reasons, we decline Robert's request for the fees and costs he has incurred on appeal.

/s/ *Peter J. Eckerstrom*

PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

/s/ *Joseph W. Howard*

JOSEPH W. HOWARD, Chief Judge

/s/ *J. William Brammer, Jr.*

J. WILLIAM BRAMMER, JR., Judge*

*A retired judge of the Arizona Court of Appeals authorized and assigned to sit as a judge on the Court of Appeals, Division Two, pursuant to Arizona Supreme Court Order filed August 15, 2012.